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In the Supreme Court of the United States

OCTOBER TERM, 1955.

No. 828

MYRTLE FANNIN,
Administratrix of the Estate of Zan Fannin, Deceased,
Petitioner,

vs.

HONORABLE PAUL JONES,
Judge of the United States District Court,
For the Northern District of Ohio,
Eastern Division,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
To the United States Court of Appeals
For the Sixth Circuit.

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THE GATES LEGAL PUBLISHING CO., CLEVELAND, OHIO—GAINS 5-6547

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In the Supreme Court of the United States

OCTOBER TERM, 1955.

No. _____

MYRTLE FANNIN,
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vs.

HONORABLE PAUL JONES,
Judge of the United States District Court,
For the Northern District of Ohio,
Eastern Division,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
To the United States Court of Appeals
For the Sixth Circuit.

Myrtle Fannin, administratrix of the estate of Zeb Fannin, deceased, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit, entered in the above entitled case on January 13, 1956, which denied a petition for a writ of mandamus to direct the respondent to nullify an order of transfer previously issued by the respondent pursuant to 28 U. S. C. 1404(a).

OPINIONS BELOW.

The opinion of the Court of Appeals (*infra*, Appendix A, p. 12) is reported at 229 F. 2d 368.

The memorandum opinion of Judge Jones on the motion to transfer the action in the District Court to the

Western Division of the United States District Court for the Northern District of Ohio is dated December 7, 1955. The opinion is not officially reported, but is printed in Appendix B, *infra*, at page 13.

JURISDICTION.

The judgment of the Court of Appeals was entered on January 13, 1956 (*infra*, Appendix A, p. 12). The jurisdiction of this Court is invoked under the provisions of 28 U. S. C. 1254(1).

QUESTIONS PRESENTED.

1. Whether under Section 1404(a) of the Judicial Code (28 U. S. C. 1404(a)) a district judge may grant a motion to transfer a cause to another division of the district solely because of the crowded condition of the docket, where the facts otherwise require that the motion be denied.

2. Whether, under the power to issue all necessary writs (28 U. S. C. 1651(a)), a writ of mandamus should issue to correct an order of transfer made by the district judge outside the bounds of legal discretion.

STATUTES INVOLVED.

The suit in the district court was instituted partially (one count) under the provisions of the Federal Employers' Liability Act, 45 U. S. C., Sections 51 *et seq.* The venue provisions of the Federal Employers' Liability Act are contained in Section 6 thereof (45 U. S. C. 56), which reads as follows:

> "No action shall be maintained under this chapter unless commenced within three years from the day the cause of action accrued.

> Under this chapter an action may be brought in a district court of the United States, in the district of the residence of the defendant, or in which the cause of action arose, or in which the defendant shall be doing business at the time of commencing such action. The jurisdiction of the courts of the United States under this chapter shall be concurrent with that of the courts of the several States."

The order of transfer was issued by the District Court upon the claimed authority of Section 1404(a) of the Judicial Code (28 U. S. C. 1404(a)), which reads as follows:

> "For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought."

Jurisdiction of the Court of Appeals was invoked pursuant to Section 1651(a) of the Judicial Code (28 U. S. C. 1651(a)), which reads as follows:

> "The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law."

STATEMENT.

The petitioner, Myrtle Fannin, is the widow of Zeb Fannin, deceased, and the administratrix of his estate by reason of appointment by the Probate Court of Clermont County, Ohio. Petitioner brought an action against the Baltimore and Ohio Railroad Company for the wrongful death of her decedent, who was struck by one of said railroad's trains while he was engaged in painting its bridge over the Sandusky River in Tiffin, Ohio. The action was filed in two counts, one under the Federal Employers' Liability Act, and the other by reason of diversity of citizenship.

The action was filed in the United States District Court for the Northern District of Ohio, Eastern Division, at Cleveland, Ohio, and is Civil Action No. 32,124 in that Court. The defendant railroad filed a motion to transfer the cause to the United States District Court for the Northern District of Ohio, Western Division, at Toledo, Ohio. Its request was based upon Section 1404(a) of the Judicial Code.

In support of its motion to transfer, the defendant railroad submitted the affidavit of Alexander H. Hadden, one of its attorneys. The affidavit named five persons whose testimony the affiant was informed and believed would be required on trial. However, the affidavit did not indicate the nature of the expected testimony, or that it would be required by the defendant railroad. Three of the five persons named in the affidavit lived in Willard, Ohio, which, the affidavit stated, is 75 miles from Cleveland and 70 miles from Toledo. One other prospective witness named in the affidavit lived in Toledo, and the other in New Richmond, Ohio, near Cincinnati.

The railroad's motion to transfer was granted by the Honorable Paul Jones, Judge of the United States District Court for the Northern District of Ohio. In his memorandum opinion (*infra*, Appendix B, p. 13) he stated:

> "Under normal circumstances the plaintiff's choice of forum together with the accessibility thereto would weigh heavily against disturbing that choice. However, the present overcrowded condition of the docket in this court which would make impossible an early trial of this case, and the prospect of an early trial and prompt disposition of the matter in the Western Division, compels me, in the interest of justice, to favor the motion to transfer."

On January 10, 1956 petitioner filed in the United States Court of Appeals for the Sixth Circuit a petition for

a writ of mandamus to the Honorable Paul Jones, United States District Judge for the Northern District of Ohio, Eastern Division, respondent herein, directing nullification of the order of transfer made in the case of Myrtle Fannin, Administratrix of the estate of Zeb Fannin, deceased v. the Baltimore and Ohio Railroad Company.

On January 13, 1956 the Court of Appeals denied the petition. (Opinion, *infra*, Appendix A, p. 12.)

At the same time the Court of Appeals denied a petition for a writ of mandamus in a similar case, entitled "Clarence P. Berkihiser, Petitioner v. Honorable Paul Jones, Respondent." A petition for a writ of certiorari is being filed concurrently in that case, and it is No. _____, October, 1955 Term in this Court.

REASONS FOR GRANTING THE WRIT.

The rulings of the courts below illustrate the frequent misconception and misapplication of the effect of *Norwood v. Kirkpatrick*, 349 U. S. 29. In comparing Section 1404(a) with the doctrine of *forum non conveniens*, the opinion of the court, at page 32, explained:

> "As a consequence, we believe that Congress by the term 'for the convenience of parties and witnesses, in the interest of justice,' intended to permit courts to grant transfers upon a lesser showing of inconvenience."

Immediately following are the overlooked or ignored words of caution:

> "This is not to say that the relevant factors have changed or that plaintiff's choice of forum is not to be considered, but only that the discretion to be exercised is broader."

I. Factors to Be Considered on Motion to Transfer.

Section 1404(a) specifically names the considerations upon which a court may base a motion to transfer. It mentions only the convenience of *parties* and *witnesses*, and in the interest of justice. Thus, the statute simply and succinctly includes only two classes of persons whose convenience is to be considered in passing upon such a motion. Significantly, convenience of the court is not included as a basis for transfer of a civil action. This omission was obviously intended by Congress because the court would have been the only other one whose convenience could possibly be affected by the venue of an action.

One of the basic rules applied in the interpretation of Section 1404(a) is that unless the balance is strongly in favor of the defendant, plaintiff's choice of forum should rarely be disturbed.

The venue privilege granted by Section 6 of the Federal Employers' Liability Act (45 U. S. C. 56) has been held to be a substantial right. *Boyd v. Grand Trunk Western R. Co.*, 338 U. S. 263, 266. In *Ex Parte Collett*, 337 U. S. 55, it was held that the venue section of the Federal Employers' Liability Act was not repealed by Section 1404(a). Hence, in order to overcome plaintiff's substantial right to a choice of forum, the balance of convenience must be strongly in favor of the defendant.

II. Condition of the Trial Calendar Is Not a Valid Reason for Transfer.

The fact that a case may be reached promptly in the proposed forum, or that it would take some time to be reached where filed, should not be considered as a valid reason for transfer.

U. S. v. Scott & Williams, Inc. (1950), S. D. N. Y., 88 F. Supp. 531, 535;

Keller-Dorian Colorfilm Corp. v. Eastman Kodak Corp. (1949), S. D. N. Y., 88 F. Supp. 863, 866;

Savoia Films S. A. I. v. Vanguard Films (1950), S. D. N. Y., 10 F. R. D. 64;

Mazinski v. Dight (1951), W. D. Pa., 99 F. Supp. 192, 194;

Ronson Art Metal Works v. Brown & Bigelow (1952), S. D. N. Y., 105 F. Supp. 169, 174, aff. 199 F. 2d 760;

Sherman v. Baltimore & Ohio R. Co. (1954), W. D. Pa., 122 F. Supp. 492, 493.

Where the balance of convenience otherwise favors the action pending in the district in which it was brought, the fact that calendars are crowded or judges overworked does not warrant denial of the court's forum to a litigant (*Ronson Art Metal Works v. Brown & Bigelow, supra,* at p. 174), and parties litigant should not, therefore, be prejudiced by the transitory and variable status of the court's docket. (*Sherman v. Baltimore & Ohio R. Co., supra,* at p. 493.)

Section 1404(a) provides for transfer of an action for the convenience of parties and witnesses, not for the convenience of the court (*Savoia Films S. A. I. v. Vanguard Films, supra,* at p. 67). Therefore, a district court may not order a transfer only to suit its personal convenience (*Keller-Dorian Colorfilm Corp. v. Eastman Kodak Corp., supra,* at p. 866; *Mazinski v. Dight, supra*; Opinion of Court of Appeals, *infra,* Appendix A, p. 12).

A similar question is now pending before this Court in *LaBuy v. Howes Leather Co., Inc.*, No. 622 October, 1955 Term, certiorari having been granted on February 27, 1956. The decision of the Court of Appeals is reported

at 226 F. 2d 703. The matter of crowded dockets was there involved as the district judge referred certain anti-trust cases to a special master under Rule 53(b) of the Federal Rules of Civil Procedure. In issuing a writ of mandamus to compel vacation of the order, Judge Lindley said, at page 709:

> "* * * In this day of crowded dockets and voluminous calendars, the position now advanced by respondent, if adopted, would make reference to a master the rule rather than the exception in every case of a complicated nature which is filed in this district."

If the condition of trial calendars were a proper element of consideration, then practically all applications to transfer from the courts of large cities would have to be granted (*U. S. v. Scott & Williams, Inc., supra*, at page 535). The purpose of the statute should not be tortured, and the choice of forum thereby transferred from the plaintiff to the defendant.

In his dissenting opinion in *Norwood v. Kirkpatrick, supra*, at page 36, Mr. Justice Clark cautioned that the effect of the decision was that the discretion of the district judge under Section 1404(a) would be expanded "to an as yet unstated degree. * * *" Although in the majority opinion Mr. Justice Minton, at page 32, did observe that the relevant factors have not changed and the plaintiff's choice of forum is still to be considered, this case highlights the prevalent erroneous conclusion that the district court has *unlimited* discretion in ruling on motions to transfer. It is the contention of the petitioner that the *Norwood* case is not authority for unlimited discretion, but only that the discretion is broader than under *forum non conveniens*. Only under blanket authority to transfer would transfer in this case have been justified.

III. The Court of Appeals Should Have Exercised Its Power to Issue a Writ of Mandamus Pursuant to Section 1651(a) of the Judicial Code.

Almost immediately following the enactment of Section 1404(a) of the Judicial Code, and ever since, the Courts of Appeals have recognized their authority to issue writs of mandamus in cases involving transfer from one district court to another district court.

Ford Motor Co. v. Ryan (1950), C. A. 2, 182 F. 2d 329, cert. den. 340 U. S. 851;
Atlantic Coast Line R. Co. v. Davis (1950), C. A. 5, 185 F. 2d 766;
Shapiro v. Bonanza Hotel, Inc. (1950), C. A. 9, 185 F. 2d 777;
Paramount Pictures, Inc. v. Rodney (1950), C. A. 3, 186 F. 2d 111, cert. den. 340 U. S. 953;
Nicol v. Koscinski (1951), C. A. 6, 188 F. 2d 537;
Wiren v. Laws (1951), C. A. D. C., 194 F. 2d 873;
Chicago, R. I. & P. R. Co. v. Igoe (1954), C. A. 7, 212 F. 2d 378.

Three such cases have reached this Court by grant of writs of certiorari. In each case it was held that a writ of mandamus was not warranted on the facts, and it was therefore unnecessary to pass upon the question of the right to issue a writ of mandamus (*Ex Parte Collett*, 337 U. S. 55; *Kilpatrick v. Texas and P. Ry. Co.*, 337 U. S. 75; *Norwood v. Kirkpatrick*, 349 U. S. 29).

In acting on a motion to transfer, the district judge is limited in his consideration to the three factors specifically mentioned in Section 1404(a), and he may not properly be governed in his decision by any other factor or factors (*Dairy Industries Supply Ass'n. v. La Buy* (1953), C. A. 7, 207 F. 2d 554, 558); but if extraneous matters

have become the basis of the decision, mandamus will lie to correct such improper exercise of discretion (*Chicago R. I. & P. R. Co. v. Igoe, supra*).

Where the district judge has ordered transfer of a case for improper reasons and outside the scope of Section 1404(a), his error can be corrected only by a writ of mandamus. If unauthorized orders of transfer were beyond the control of the Court of Appeals, the effect would be to deprive litigants of forums to which they are entitled (*Wiren v. Laws, supra*). Such error cannot be corrected by appeal after judgment, and the petitioner would be left with an empty claim of prejudicial denial of trial in a proper forum.

IV. The Berkihiser Case.

A petition for a writ of certiorari is concurrently being filed in the *Berkihiser* case, which involved an action against the Pennsylvania Railroad Company under the Federal Employers' Liability Act. Suit was filed in the District Court for the Northern District of Ohio, Eastern Division. The plaintiff lived and the accident occurred in Pennsylvania within 40 miles of Youngstown, Ohio, one of the places where court is held in the Northern District of Ohio, Eastern Division. On motion, the case was transferred by order of the Honorable Paul Jones to the Western District of Pennsylvania on January 5, 1956, about a month after his ruling of the instant case.

The opinion of the District Judge in the *Berkihiser* case did not specifically say that transfer was granted because of the overcrowded condition of the docket in the District Court as it did in this case; it merely repeated the words of the statute (Section 1404(a)). However, from his previously expressed attitude on the matter of

alleviating the crowded condition of the docket by transfer of cases (opinion, *infra*, Appendix B, p. 13), that factor apparently controlled the decision of the District Judge.

CONCLUSION.

These two cases point up how far beyond proper limits of discretion District Courts may go in transferring cases, unless guideposts of interpretation mark the limits of discretion and help to maintain some uniformity of decision in this vitally important procedural aspect of litigation. Parallel and comparable factual situations could easily be subject to opposite rulings by different courts, by various judges of the same court, and even by the same district judge in successive cases.

The improper and groundless transfer of a civil action may and should be corrected by a writ of mandamus. Moreover, the issues involved in this case transcend the denial of the rights of one litigant. Motions to transfer are filed and ruled upon almost daily in many district courts. Error compounded and multiplied is a matter of utmost judicial importance. This petition for a writ of certiorari should, therefore, be granted.

Respectfully submitted,

ELMER I. SCHWARTZ,

Counsel for Petitioner.

Dated: Cleveland, Ohio,
April 5, 1956.

APPENDIX A.

OPINION AND ORDER OF THE COURT OF APPEALS.

(Entered January 13, 1956.)

Before SIMONS, Chief Judge, and STEWART, Circuit Judge.

Petitioner seeks a writ of mandamus to compel the district judge to vacate his order entered under 28 U. S. C. A., § 1404(a), transferring from the Eastern to the Western Division of the Northern District of Ohio petitioner's suit against the Baltimore and Ohio Railroad Company. In granting the motion for transfer, the district judge gave consideration to the fact that an early trial would be impossible in the Eastern Division because of an overcrowded docket and to the prospect of an early trial in the Western Division. The transfer is claimed to be improper solely because the court thus gave weight to the relative docket conditions in the two Divisions. A court should not under § 1404(a) look to docket conditions in order simply to serve the court's own convenience. Cf. *Keller-Dorian Colorfilm Corp. v. Eastman Kodak Corp.*, 88 F. Supp. 863, 866 (S. D. N. Y., 1949), see also *Dairy Industries Supply Ass'n. v. LaBuy*, 207 F. (2d) 554, 558 (7 Cir., 1953). A prompt trial, however, is not without relevance to the convenience of parties and witnesses and the interest of justice. Cf. *United States v. Scott & Williams, Inc.*, 88 F. Supp. 531, 535 (S. D. N. Y., 1950). In a wrongful death case promptness of determination is clearly in the interest of justice. The district court has a broad discretion under § 1404(a), *Norwood v. Kirkpatrick*, 349 U. S. 29 (1955). The limits of that discretion were not exceeded here.

The petition for a writ of mandamus is denied.

APPENDIX B.

MEMORANDUM ON MOTION TO TRANSFER.

(Entered December 7, 1955.)

The accident complained of occurred in the City of Tiffin, Ohio, which is in the Western Division of the Northern District of Ohio.

Defendant moves the court for an order to transfer this action from this division to the Western Division.

Under normal circumstances the plaintiff's choice of forum together with the general accessibility thereto would weigh heavily against disturbing that choice. However, the present over-crowded condition of the docket in this court which would make impossible an early trial of this case, and the prospect of an early trial and prompt disposition of the matter in the Western Division, compels me, in the interest of justice, to favor the motion to transfer.

The defendant should be given twenty days following the docketing of this action in the Western Division in which to move or plead.

/S/ JONES,

United States District Judge.

December 7, 1955.

APPENDIX C.

ORDER GRANTING MOTION TO TRANSFER.

(Entered December 8, 1955.)

Upon consideration, it is ordered that defendant's motion to transfer is hereby granted.

IT IS, THEREFORE, ORDERED that this cause be transferred to the United States District Court for the Northern District of Ohio, Western Division, at Toledo, Ohio.

IT IS FURTHER ORDERED that leave is granted defendant to move or plead within twenty (20) days following the docketing of this action in the Western Division.

/S/ JONES,

Chief Judge.

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HAROLD B. WIL

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BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

To the United States Court of Appeals
For the Sixth Circuit.

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Respondent.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

To the United States Court of Appeals
For the Sixth Circuit.

The petition for certiorari in this case seeks review of the refusal of the Court of Appeals for the Sixth Circuit to compel Respondent, by writ of mandamus, to vacate an order transferring a wrongful death action entitled *Myrtle Fannin, Admx. vs. The Baltimore and Ohio Railroad Company* from the Eastern to the Western Division of the Northern District of Ohio, at Cleveland and Toledo, respectively.

QUESTIONS PRESENTED.

In Respondent's view, Petitioner's statement of the questions presented by the present case is inadequate, inaccurate, and misleading. The issue with which Petitioner's Question 1 attempts to deal should be stated as follows:

1. Whether, in granting a motion to transfer a wrongful death action to another Division of the same District, Respondent District Judge had discretion under Section 1404(a) of the Judicial Code (28 U. S. C. § 1404(a)) to give weight to the circumstance, *among others*, that such action would be reached for trial and disposed of much more expeditiously in the court to which transfer was ordered.

Petitioner's Question 2 should not be reached, because the order of transfer entered in the District Court was fully justified by defendant's showing with regard to the convenience of the parties and witnesses and the interest of justice. There is thus no question in this case of the power of the Court of Appeals under the "all writs" section of the Judicial Code (28 U. S. C. § 1651(a)) to issue a writ of mandamus.

STATUTES INVOLVED.

Apart from § 1404(a), Petitioner quotes (Petition, pp. 2-3) as one of the statutes involved, Section 6 of the Federal Employers' Liability Act, 45 U. S. C. § 56, which is a special venue provision affecting actions brought thereunder, and which, in so far as pertinent, permits suit to be brought in any District "in which defendant shall be doing business" at the time of filing. Since this Court's decisions in *Ex Parte Collett*, 337 U. S. 55 (1949), and *Kilpatrick v. Texas & P. R. Co.*, 337 U. S. 75 (1949), it has been clear that § 1404(a) is as fully applicable to Federal Employers' Liability Act cases as to civil actions unaffected by any special venue provision. Therefore, except to the extent that it authorized Petitioner in the first instance to file her wrongful death action in the District Court at Cleveland, Section 6 is in no way involved in this case.

STATEMENT OF THE CASE.

On September 23, 1955, Petitioner filed suit in the United States District Court at Cleveland, Ohio, seeking damages from defendant, The Baltimore and Ohio Railroad Company, for the alleged wrongful death of her decedent when he was struck by defendant's locomotive in the city of Tiffin, Ohio. The complaint alleged plaintiff's residence as New Richmond, Ohio, a community in the vicinity of Cincinnati, and asserted that at the time of the accident decedent was employed as a painter by a firm known as Johnson Brothers Company, of Pittsburgh, which had contracted with defendant railroad to paint its bridge across the Sandusky River at Tiffin. Decedent was said to have been engaged in painting the bridge at the time of his death. Two causes of action were alleged. In the first count it was asserted that "by reason of the work control and work supervision reserved by defendant in its agreement with the Johnson Brothers Company, and further by reason of the work control and work supervision exercised by defendant in the painting of said bridge, plaintiff's decedent was in the employ of defendant," so as to entitle Petitioner to sue under the Federal Employers' Liability Act. In the second count, a common law cause of action for negligence was stated, and jurisdiction was predicated upon diversity of citizenship. The full text of Petitioner's complaint (R. 16) is printed as Appendix A hereto, p. 12, *infra*.

Defendant railroad company thereupon filed its motion under § 1404(a) to transfer the action from the Eastern Division of the Northern District of Ohio at Cleveland to the Western Division of the same District at Toledo. (R. 20.) In support of such motion, defendant filed the affidavit of one of its counsel, the entire text of which affidavit was as follows:

"ALEXANDER H. HADDEN, being first duly sworn, deposes and says that he is of counsel for defendant, The Baltimore and Ohio Railroad Company; that he is informed, and believes, that trial of the within action will require the testimony of the witnesses whose names and addresses follow:

Kenneth Kieffer
311½ West Maple St.
Willard, Ohio

Lowell W. Dallas
Y. M. C. A.
Toledo, Ohio

Donald L. Berry
327 Spring St.
Willard, Ohio

Richard Kilgore
R. R. No. 2
Batavia, Ohio

Clinton T. Kieffer
311 Maple St.
Willard, Ohio

Affiant further says that it is probable that the testimony of one or more of defendant's employees in the city of Tiffin, Ohio, will be required to testify upon the trial of the within cause upon the issue and nature of the extent of defendant's control and supervision, if any, over the work being performed by plaintiff's decedent at the time of the accident.

Affiant further says that the distances between the places of residences of the witnesses and the place of accident on the one hand and Cleveland and Toledo, respectively, on the other hand are as follows:

Tiffin-Toledo	49 miles
Tiffin-Cleveland	94 miles
Willard-Cleveland	75 miles
Willard-Toledo	70 miles
Batavia-Cleveland	245 miles
Batavia-Toledo	200 miles
New Richmond-Cleveland	260 miles
New Richmond-Toledo	215 miles

Further affiant saith not."

The full text of defendant's motion to transfer and supporting brief are printed in Apppendix B hereto, p. 16, *infra.*

Petitioner opposed the motion to transfer by brief, but filed no counter-affidavit, and did not controvert any of the factual allegations contained in the affidavit and brief filed on behalf of defendant.

On December 7, 1955, Respondent granted defendant's motion to transfer, and the action was forthwith transferred to and is now pending in the Western Division at Toledo. The full text of Respondent's memorandum opinion (R. 13) is printed in Appendix B of the petition for certiorari.

Thereafter, Petitioner filed a petition for writ of mandamus in the Court of Appeals for the Sixth Circuit, which was denied on January 13, 1956. The opinion of the Court of Appeals is reported at 229 F. (2d) 368, and is printed as Appendix A to the petition for certiorari.

ARGUMENT.

I. Respondent's Decision Was Not Based Solely Upon Crowded Docket Conditions.

The fact that the petition for certiorari argues at length the merits of Petitioner's case, rather than suggesting reasons why this Court should grant the writ, has made necessary a brief reference to the evidence supporting the motion to transfer in the District Court. Respondent is confident that such reference, together with a short discussion of the applicable decisions of this Court, will demonstrate both that the rulings below were amply justified in fact and law and that, as a consequence, there are no novel or important questions which require further decision of the Supreme Court.

Throughout the petition for certiorari it is assumed and argued that the sole ground upon which Respondent could have relied in granting defendant railroad's motion to transfer was the fact that a speedier trial could be had in the Western Division of the Northern District of Ohio than in the Eastern Division. Petitioner's contentions in this regard are apparently based upon the following language of Respondent's order of December 7, 1955:

> "Under normal circumstances the plaintiff's choice of forum together with the general accessibility thereto would weigh heavily against disturbing that choice. However, the present over-crowded condition of the docket in this Court which would make impossible an early trial of this case, and the prospect of an early trial and prompt disposition of the matter in the Western Division, compels me, in the interest of justice, to favor the motion to transfer." (R. 12.)

It is obvious from the above language that Respondent would have denied the motion to transfer had the factor of the crowded docket not been present. But it does not follow, as Petitioner suggests, that this was the *only* factor which Respondent could or did consider, or that he disregarded other factors of convenience favoring a trial at Cleveland. On the contrary, as indicated in the "Statement of the Case," the facts that the convenience of *both* parties and *all* witnesses would be better served by trial at Toledo were not contested in any way by Petitioner.* (See pp. 3-5, *supra*.)

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* Four of the five known witnesses resided in the Western Division, and the fifth witness and plaintiff herself resided some 45 miles closer to Toledo than to Cleveland. Petitioner argued in the District Court that these differences in mileage were not sufficiently great to require transfer. It is sufficient answer to this contention that § 1404(a) specifically permits transfer "to any other district *or division*" where the action might have been brought, thus contemplating intra-district transfers which can never involve great distance differentials between alternative places of trial.

Instead, Petitioner's brief in opposition restricted itself to arguing that defendant's showing did not sustain the burden of proof under § 1404(a). This assertion might have been true in the absence of great disparity in docket conditions as between the two courts: from six to nine months' delay at Toledo as compared with approximately three years at Cleveland. But Respondent's decision was necessarily based not upon a separate weighing of a single factor *in vacuo*, but upon a *composite* evaluation of *all* the legally relevant facts, including both the uncontroverted assertions of defendant's affidavit with reference to convenience of parties and witnesses, and the comparative promptness of trial. Accordingly, the fact that Respondent's brief memorandum opinion mentions only the latter consideration, instead of reviewing all the evidence at length, means nothing more than that it was the one factor which, added to the other evidence, tipped the balance in favor of transfer.

II. The Condition of the Trial Calendar May be Considered in Ruling Upon Motions to Transfer.

Prior to the 1948 enactment of § 1404(a), the leading decision of this Court governing motions to dismiss upon the common law ground of *forum non conveniens* was *Gulf Oil Corp. v. Gilbert*, 330 U. S. 501 (1947). In listing the factors which might be considered in determining whether the place of suit was an inconvenient forum, this Court said:

> "Factors of public interest also have a place in applying the doctrine. *Administrative difficulties follow for courts when litigation is piled up in congested centers instead of being handled at its origin.* Jury duty is a burden that ought not to be imposed upon the people of a community which has no rela-

> tion to the litigation. * * * There is a local interest in having localized controversies decided at home * * *." (*Id.* at 508-9; emphasis supplied.)

In *Norwood v. Kirkpatrick*, 349 U. S. 29 (1955), the Court made clear that under § 1404(a), which was enacted shortly after the *Gulf Oil* decision, the considerations defined in that case were still relevant to motions to transfer under the new statute:

> "* * * we believe that Congress, by the term 'for the convenience of parties and witnesses, in the interest of justice,' intended to permit courts to grant transfers upon a lesser showing of inconvenience. *This is not to say that the relevant factors have changed* or that the plaintiff's choice of forum is not to be considered, but only that *the discretion to be exercised is broader.*" (*Id.* at 32; emphasis supplied.)

Thus, not only was the condition of the respective trial calendars entitled to consideration under the *Gulf Oil* case but Respondent could, in his enlarged discretion under the *Norwood* case, give such additional weight to this factor as to him seemed proper.

At pages 6-7 of the Petition, Petitioner points to several decisions in which the courts of appeals and district courts have limited the extent to which docket conditions may be considered on motions to transfer. However, Petitioner fails to refer to the multitude of cases, cited in the footnote*, in which, consistent with the *Gulf Oil* decision,

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* *Chicago, R. I. & P. R. Co. v. Igoe*, 220 F. (2d) 299, 303 (C. A. 7th, 1955); *Maloney v. New York, N. H. & H. R. Co.*, 88 F. Supp. 568, 572 (D. C. N. Y., 1949); *Healy v. New York, N. H. & H. R. Co.*, 89 F. Supp. 614, 619 (D. C. N. Y., 1949); *Mazula v. Delaware & Hudson R. Corp.*, 90 F. Supp. 966, 967 (D. C. N. Y., 1950); *Automatic Washer Co. v. Easy Washing Machine Corp.*, 91 F. Supp. 894, 895 (D. C. N. Y., 1950); *Ortiz v. Union Oil Co.*, 102 F.

(Continued on next page)

the lower federal courts have given weight to the fact that a speedier trial may be had in one of the two courts involved.

Thus, whether crowded docket conditions are considered to bear upon the statutory issue of "the interest of justice," as Respondent viewed it, or upon the issue of the "convenience of parties," as did the Court of Appeals, there can be no doubt but that the factor was entitled to weight.

III. The Court of Appeals' Mandamus Jurisdiction.

Petitioner contends that the present case is one in which the Court of Appeals should have exercised its power to issue a writ of mandamus under § 1651(a) of the Judicial Code, and cites several decisions holding that the Courts of Appeals have the power to issue writs of mandamus to correct abuses of discretion of the district courts in ruling upon transfers. (Petition, p. 9.) As heretofore demonstrated, the present case is one in which the transfer was fully supported by the facts and by the applicable decisions of this Court, and there is, therefore, no reason to consider whether it was within the power of the Court of

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(Continued from preceding page)

Supp. 492, 494 (D. C. N. Y., 1952); *First National Bank v. Fidelity & Deposit Co.*, 107 F. Supp. 894, 895 (D. C. Mass., 1952); *Marks v. Fireman's Fund Insurance Co.*, 109 F. Supp. 800, 802 (D. C. N. Y., 1953); *Savage v. Kaiser Motors Corp.*, 116 F. Supp. 433, 434 (D. C. Minn., 1953); *Kest v. New York Central R. Co.*, 116 F. Supp. 615, 616 (D. C. N. Y., 1953); *Anderson v. Buckeye S. S. Co.*, 116 F. Supp. 870, 871 (D. C. N. Y., 1953); *Seaboard Machinery Corp. v. Bethlehem Steel Co.*, 120 F. Supp. 591, 593-4 (D. C. Fla., 1954); *Sonenshine v. Atlantic Coast Line R. Co.*, 123 F. Supp. 829 (D. C. N. Y., 1954); *Cold Metal Products Co. v. Crucible Steel Co.*, 126 F. Supp. 546, 551-2 (D. C. N. J., 1954); *Revere Camera Co. v. Masters Mail Order Co.*, 127 F. Supp. 129, 132 (D. C. Md., 1954).

Appeals to issue its writ of mandamus.* Certainly the case is not one of those "really extraordinary" situations which this Court has held to be the only type justifying the use of this extraordinary remedy. *Ex Parte Fahey*, 332 U. S. 258, 260 (1947).

CONCLUSION.

The present case is one of the large number arising under § 1404(a) in which it is possible for the courts to differ with respect to the balance of "convenience" and "the interest of justice." In his discretion, Respondent determined that justice would be better served by a transfer to Toledo. That determination is perfectly consistent with the decisions of this Court in the *Gulf Oil* and *Norwood* cases.

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* The case of *The Baltimore and Ohio Railroad Company v. Hon. James C. Connell*, October Term, 1955, No. _____, Petition for Certiorari filed May ___, 1956, directly raises the question of the nature and extent of appellate courts' power to issue writs of mandamus in transfer cases. For a full treatment of that question, upon which there is a wide divergence of appellate opinion, the attention of the Court is invited to the petition for certiorari in that case.

No novel or unusual fact situation is presented, and Petitioner points to no conflicts of authority among the courts of appeals or district courts which require settlement by this Court. All questions of statutory interpretation arising herein have already been set at rest. The best that can be said is that Petitioner contends that the decisions of the courts below are erroneous. Even if this were so, it would not afford the basis for an assumption of jurisdiction by this Court. For the foregoing reasons, Respondent submits that the petition for certiorari should be denied.

Respectfully submitted,

HOWARD F. BURNS,
DWIGHT B. BUSS,
ALEXANDER H. HADDEN,
Attorneys for Respondent.

APPENDIX A.

Complaint.

CIVIL ACTION No. 32,124.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO,
EASTERN DIVISION.

MYRTLE FANNIN,
Administratrix of Estate of Zeb Fannin, deceased,
R. F. D. #2, New Richmond, Ohio,
Plaintiff,

vs.

BALTIMORE & OHIO RAILROAD CO.,
A Corporation,
Defendant.

COMPLAINT.

FIRST COUNT.

I. This action is brought under and by virtue of the Federal Employers' Liability Act against the defendant, the Baltimore & Ohio Railroad Co., a corporation, engaged as a common carrier in interstate commerce and maintaining an office and doing business within the jurisdiction of this Court.

II. Plaintiff says that she is the widow of Zeb Fannin, deceased, and that she is the duly appointed, qualified and acting administratrix of the estate of Zeb Fannin, having been appointed such by the probate court of Clermont County, Ohio.

III. At all times herein mentioned, the defendant owned and maintained a double track railroad bridge over the Sandusky river in the City of Tiffin, Ohio.

IV. Prior to September 29, 1953, the defendant entered into an agreement with the paint contracting firm of Johnson Brothers Company, of Pittsburgh, Pennsylvania for the performance of certain painting work on the part of Johnson Brothers Company, including the painting of the aforementioned double track bridge.

V. Prior to September 29, 1953, plaintiff's decedent was hired by the aforementioned Johnson Brothers Company as a painter in the painting of defendant's double track bridge, and by reason of the work control and work supervision reserved by defendant in its agreement with the Johnson Brothers Company, and further by reason of the work control and work supervision exercised by defendant in the painting of said bridge, plaintiff's decedent was in the employ of defendant and all or part of his duties were in the furtherance of interstate commerce or directly, closely and substantially affecting such commerce.

VI. On or about September 29, 1953, while plaintiff's decedent was performing his duties as a painter on defendant's double track bridge, the defendant so carelessly and negligently maintained and operated said bridge and right of way thereabouts, and so negligently and carelessly failed to provide plaintiff's decedent with a safe place in which to carry on his work, and so negligently and carelessly operated its locomotive and train, that the plaintiff's decedent was struck by defendant's locomotive while on said double track bridge and was instantly killed.

VII. Plaintiff's decedent left surviving him as his next of kin his widow, the plaintiff, who had a pecuniary interest in his life, and for whose benefit this action is brought.

VIII. At the time of sustaining the injuries resulting in his death, the plaintiff's decedent was 61 years old in

good health, and earning and capable of earning substantial wages in his occupation.

SECOND COUNT.

IX. Plaintiff is a citizen of the State of Ohio and defendant is a corporation incorporated under the laws of the State of Maryland. The matter in controversy exceeds, exclusive of interest and costs, the sum of Three Thousand ($3.000.00) Dollars.

X. At all times herein mentioned the defendant was and is engaged as a common carrier by rail in interstate commerce, maintaining and operating a system of railroads between the several states, and owning and maintaining in and about the City of Tiffin, Ohio, tracks and rights of way, in particular owning and maintaining a double track bridge over the Sandusky river in the City of Tiffin, Ohio.

XI. Plaintiff says that she is the widow of Zeb Fannin, deceased, that she is the duly appointed, qualified and acting administratrix of the estate of Zeb Fannin, having been appointed such by the probate court of Clermont County, Ohio.

XII. Prior to September 29, 1953, the defendant entered into an agreement with the paint contracting firm of Johnson Brothers Company of Pittsburgh, Pennsylvania, for the performance of certain painting work including the painting of the aforementioned double track bridge.

XIII. Prior to September 29, 1953, plaintiff's decedent was hired by the aforementioned Johnson Brothers Company as a painter in the painting of defendant's double track bridge and as such, was invited by defendant to come upon the premises of defendant in and about its right

of way and double track bridge and was, at all times herein mentioned, known by defendant to be upon said premises.

XIV. On or about September 29, 1953, while plaintiff's decedent was performing his duties as a painter on defendant's double track bridge, the defendant so carelessly and negligently maintained and operated said bridge and right of way thereabouts, and so negligently and carelessly failed to provide plaintiff's decedent with a safe place in which to carry on his work, and so negligently and carelessly operated its locomotive and train with knowledge of plaintiff's decedent's presence upon said premises, that the plaintiff's decedent was struck by defendant's locomotive while on said double track bridge and was instantly killed.

XV. Plaintiff's decedent left surviving him as his next of kin his widow, the plaintiff, who had a pecuniary interest in his life, and for whose benefit this action is brought.

XVI. At the time of sustaining the injuries resulting in his death, the plaintiff's decedent was 61 years old, in good health, and earning and capable of earning substantial wages in his occupation.

WHEREFORE, plaintiff demands judgment against the defendant in the sum of One Hundred Thousand ($100,000.00) Dollars, together with the cost of the within action.

A trial by jury is hereby demanded.

HOWARD M. METZENBAUM,
JOSEPH I. WILLIAMS,
Attorneys for Plaintiff.

Of Counsel:

ROBERT R. DISBRO,
ELMER I. SCHWARTZ.

APPENDIX B.

Motion to Transfer and Brief.

MOTION TO TRANSFER.

Now comes defendant, THE BALTIMORE AND OHIO RAILROAD COMPANY, and moves the Court for the entry of an order transferring the within cause to the United States District Court for the Northern District of Ohio, Western Division, at Toledo, Ohio, and extending the time within which defendant may move or answer until twenty (20) days following the docketing of said cause in said court. This motion is made for the reasons and upon the grounds stated in the attached Brief, which by this reference is made a part hereof.

/s/ DWIGHT B. BUSS,
/s/ ALEXANDER H. HADDEN,
BAKER, HOSTETLER & PATTERSON,
Attorneys for Defendant.

BRIEF.

This action is brought by Myrtle Fannin, as administratrix of the estate of Zeb Fannin, who is alleged to have sustained fatal injuries while engaged, as an employee of Johnson Brothers Company, painting contractors, in painting defendant's railroad bridge which crosses the Sandusky River in Tiffin, Ohio. The complaint further alleges that plaintiff's decedent was instantly killed when struck by a locomotive operated by defendant across said bridge.

The instant motion is brought pursuant to § 1404(a) of the Judicial Code, 28 U. S. C. A., § 1404(a), in which "the convenience of parties and witnesses" is made the test of transferability.

As appears from the affidavit of counsel, which is attached hereto as "Exhibit A" and made a part hereof, trial

of this cause will require the testimony of at least four of the Railroad's employees who were in charge of the operation of the train which is claimed to have struck plaintiff's decedent. Perhaps the most important of these, the Engineer, resides in Toledo, Ohio, while the remaining three live in Willard, Ohio, which is closer to both Tiffin and Toledo than to Cleveland. Clearly, the convenience of these witnesses will be better served by a trial at Toledo. Moreover, although defendant has not as yet fully investigated the circumstances of the employment of plaintiff's decedent, it is more than likely that trial of the action will involve the testimony of defendant's supervisory employees at Tiffin. Testimony of this kind is made relevant by virtue of the fact that the complaint attempts to state two causes of action: One for the wrongful death of plaintiff under the statutes of the State of Ohio, and a second based upon the Federal Employers' Liability Act. The latter cause of action is predicated upon the allegation that plaintiff's decedent, though the employee of an independent contractor, was under the "work control and work supervision" of defendant, so as to become its employee within the meaning of the Act. Defendant anticipates that this allegation will be controverted, and it is obvious that the factual issue so raised will be resolvable only through proof of the nature of the asserted supervision and control, if any, exercised by defendant in respect of the work performed by plaintiff's decedent. It is reasonable to expect that such proof will consist largely of witnesses residing at Tiffin, in Seneca County, Ohio, a city within the Western Division of this District.

In so far as is now known, the only other testimony which will be required upon trial of the case will be that of plaintiff herself and of a fellow-employee of plaintiff's decedent. Both plaintiff and such fellow-employee are res-

idents of Clermont County, Ohio, which is located just east of Cincinnati on the Ohio River. As shown by the attached affidavit, the residences of these two witnesses are approximately 200 miles from Toledo, as compared with 245 miles from Cleveland. Their convenience would also be better served by trial at Toledo.

Further, it is not inappropriate to suggest that the earlier trial which will result through transfer of this case to Toledo will promote the interests of both parties by assuring a prompt disposition of the action, the larger interest of a fair and just result through trial at a time when the material facts will be comparatively fresh in the minds of the witnesses, and, finally, the convenience of this Court by relieving its crowded civil docket of one jury trial.

Defendant's motion also asks that the time within which defendant may move or plead be extended until twenty (20) days following the docketing of the cause in the Western Division. Such request is made for the reason that if transfer of the case to Toledo is ordered, the case will be defended and tried by defendant's Toledo counsel, and defendant feels that the answer or other pleading should be framed by the attorney who will have final trial responsibility for the case. It is obvious that no prejudice can result to plaintiff from the granting of this motion.

For the foregoing reasons, defendant submits that this case falls within the letter and spirit of § 1404(a) of the Judicial Code, and that transfer should accordingly be granted.

Respectfully submitted,

/s/ DWIGHT B. BUSS,
/s/ ALEXANDER H. HADDEN,
Attorneys for Defendant.